SUPREME COURT, U. S.

AUG 4 1967

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No. 227

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner*

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL, *Respondents*

RESPONDENTS' CONDITIONAL CONCURRENCE IN PETITION FOR CERTIORARI AND MOTION FOR CONSECUTIVE ORAL ARGUMENTS

Of Counsel:
BUTLER, BINION, RICE, COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002

CECIL N. COOK
NEAL POWERS, JR.
1100 Esperson Building
Houston, Texas 77002
Attorneys for E. Cockrell, Jr., Freeport Sulphur Company, and U. S. Oil of Louisiana Inc.

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(List of Parties and Attorneys Continued on Inside Front Cover)

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BRUCE R. MERRILL
JOSEPH C. JOHNSON
THOMAS H. BURTON
P. O. Box 2197
Houston, Texas 77001
Attorneys for
Continental Oil Company

W. P. BARNES
JERE G. HAYES
Meadows Building
Dallas, Texas 75206

Of Counsel:
GANTEY, HANGER,
GOOCH, CRAVENS
& SCARBOROUGH
1800 First National Building
Fort Worth, Texas 76102

CECIL E. MUNN
H. CARTER BURDETTE
1800 First National Building
Fort Worth, Texas 76102
Attorneys for General American
Oil Company of Texas

Of Counsel:
MILLING, SAAL,
SAUNDERS, BENSON
& WOODWARD
1122 Whitney Building
New Orleans, La. 70130

H. H. HILLYER, JR.
H. H. HILLYER III
1122 Whitney Building
New Orleans, Louisiana 70130
Attorneys for
J. Ray McDermott & Co., Inc.

OLIVER L. STONE
THOMAS G. JOHNSON
3969 R. C. A. Building
50 West 50th Street
New York, New York 10020
Attorneys for
Shell Oil Company

MURRAY CHRISTIAN
H. W. VARNER
P. O. Box 1521
Houston, Texas 77001
Attorneys for
The Superior Oil Company

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The question presented by the Federal Power Commission's petition for certiorari in this cause is closely related to the question presented by the Commission's petition for certiorari in No. 60, October Term, 1967, (originally No. 1133, October Term, 1966)[1]. The facts, though not identical, are similar. By reason of those circumstances, Respondents respectfully urge that:

(1) *If the Court determines to grant the Commission's petition in No. 60*, then certiorari should also be granted in this case in order that

[1] The "question presented" in both cases is whether the Commission may retroactively impose refund conditions on sales of gas which were made under temporary certificates issued without refund conditions. The statement of this question in the petitions for certiorari is somewhat less than candid.

the Court may have the benefit of Respondents' written and oral analysis of the threatened extension of administrative power against them. [For reasons more fully stated in the Brief in Opposition filed herein, the parties to this Motion believe certiorari should be denied in *both cases*. All action on this Motion is for that reason, expressly conditioned on the granting of certiorari in No. 60.]

(2) The two cases (Nos. 60 and 227) should be scheduled for consecutive hearings.

This specific plea that these Respondents be heard, in advance of any determination by this Court with respect to the asserted power of a federal agency to impose severely punitive orders upon these Respondents, is prompted by the Commission's apparent effort to deny us that privilege. The Commission's petition concludes (p. 7):

> "The petition for a writ of certiorari should be held to abide the Court's *final* disposition of the petition in No. 1133 [No. 60, October Term, 1967]"[2]

The substance of the treatment requested by the Commission is a command that the private parties, who successfully litigated this case below, sit silently by while their adversary argues to this Court against them, seeking an adverse adjudication of their rights in the context of another's litigation. That kind of judicially imposed default would neither be fair to the litigants nor helpful to the Court.

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[2]Emphasis supplied throughout.

THE SHOCKING IMPORT OF THE ASSERTED ADMINISTRATIVE POWER JUSTIFIES A COMPLETE PRESENTATION

We believe the power here asserted by the Federal Power Commission, if upheld through a reversal of the Court of Appeals, would undermine the very integrity of the administrative process. If there is any possibility that such a belief is well founded, then certainly this Court ought to hear from the parties affected before deciding the issue. A decision of the Supreme Court of the United States involving governmental credibility is far too vital to rest upon anything less than a presentation by all of the interested litigants.

The Commission, having authorized these Respondents to make sales of natural gas with orders and other overt public assurances that the prices charged would not be subject to *retroactive* change, now seeks the power to repudiate those orders and other assurances. Thus, for example, only four short years ago a unanimous Commission, in an unappealed from final order involving certain of the temporary certificates here in issue, held and thereby publicly acknowledged that a claim to such power would crack the foundations of administrative integrity:

> "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them. Such a course of action * * * would so denature the value of a Commission authorization as to place any

> **reliance upon our actions in this area in serious jeopardy."[3]**

Previously, then Chairman Swidler, in his address at the 1961 Annual Meeting of the American Petroleum Institute to the leaders of the regulated industry, had also given his word that temporary certificates issued without price conditions were intended to "authorize initial sales *on a firm basis*" so that the "producers may know that all of the new initial price is theirs to keep . . ."[4]

Seeking now to renege on such unequivocal assurances, the Commission actually ridicules Respondents for their naivete in relying upon an agency of the United States Government:

> "These producers, similar to several others, could have obtained permanent certificates long ago [by waiving their right to a hearing] which would have fixed with finality their initial rates, but *they gambled on securing ratification of their higher contract prices and they lost.*"[5]

We are not alone in our conviction that nothing less is here at issue than the integrity of the administrative process. A unanimous Court of Appeals, in the decision below, expressed a similar concern:

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[3]Order Denying Motion to Impose Price Conditions in Temporary Certificates issued February 4, 1963, *In the Matters of General American Oil Company of Texas* et al, Docket Nos. CI61-182 et al, 29 FPC 223, 225.

[4]Swidler, Joseph C., Address to the Annual Meeting of the API (November 15, 1961), distributed through the Federal Power Commission's Office of Public Information.

[5]Opinion and Order Requiring Refunds issued June 1, 1966, *In the Matters of Skelly Oil Company et al,* Docket Nos. G-18638 et al, pp. 4-5.

> "* * * **we consider it unconscionable** to impose upon an unwary producer a ***hidden liability*** which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principal of imposing and enforcing a ***retroactive condition*** where none exists, if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case."[6]

THE COURT'S EFFORT TO REACH A JUST DECISION WILL BE AIDED BY HEARING ARGUMENTS FROM THESE RESPONDENTS

The practice of hearing from all parties in pending cases involving similar questions is contemplated by this Court's Rule 43(5):

> "*Two or more cases*, involving the same question *may* on the court's own motion or by special permission *on* the *motion* or stipulation of the parties, *be argued* together as one case, or *on such terms as may be prescribed.*"

Our request for consecutive arguments is likewise in keeping with prior practice:

> "When different cases presenting substantially the same issue come before the Court at the same time, * * * *counsel will usually be permitted* either *to argue the cases separately, in order*, or to consolidate the arguments, so that all the petitioners precede all the respondents."[7]

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[6] *Pan American Petroleum Corp. v. Federal Power Commission*, 376 F.2d 161, 173 (1967).

[7] Supreme Court Practice, Stern and Gressman (2nd Ed. 1954), p. 328.

Just last term, for instance, this Court granted petitions for certiorari in two cases presenting closely related questions and scheduled them for consecutive hearings.[8] The separate (but consecutive) arguments were so helpful in the Court's consideration of those cases that the decisions were subsequently handed down together. Though opposite results were reached in the two cases, the similarities and contrasts helped illuminate the way to the proper decision. This Court concluded:

> "We think they are best treated together in one opinion."[9]

Similarly the opinion of the Court of Appeals in *Sunray* (No. 60 in this Court) was not written until that Court had also heard oral argument in this case. When the *Sunray* opinion was issued, the Court expressly acknowledged its indebtedness to the oral argument in our case.[10] The Court will no doubt itself recall numerous such instances where the cumulative contribution of argument in cases presenting similar questions has been of material benefit in the proper decision of those cases.

The contribution of full and adequate oral argument to the judicial task of reaching a proper decision has often received recognition by this Court and by its

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[8]No. 150, *Associated Press v. Walker*, and No. 37, *Curtis Publishing Company v. Butts*, Order Scheduling for Consecutive Oral Arguments reported at 35 Law Week 3270.

[9]Id., Opinion issued June 12, 1967, slip ed. p. 3.

[10]*Sunray DX Oil Company v. FPC*, 370 F.2d 181, 191, Note 36 (10th Cir. 1966).

individual Justices. Rule 45(1) is an eloquent tribute to the necessity for oral submissions:

> "The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

One of this Court's leading pronouncements in recent years is the decision in *Brown v. Board of Education*, 347 U.S. 483 (1953). When that case was being presented, the State of Kansas did not propose to appear in oral argument or present a brief. This Court, recognizing the importance of hearing from all parties vitally affected by the decision to be rendered in the case, on November 24, 1952, ordered:

> "* * * we request that the State present its views at oral argument."[11]

The following June the Court assigned the case for reargument, specifying certain areas of difficulty. In that order the Court sought further help from argument of counsel:

> "The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."[12]

The Honorable Robert H. Jackson, a former Associate Justice of this Court, in his widely cited article on Advocacy Before the Supreme Court, told the American Bar:

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[11]344 U.S. 141.

[12]345 U.S. 972-3.

> "I think that Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations."[13]

Moreover the Federal Power Commission has itself cautioned against the resolution of important issues of administrative power except in a context where "interested parties can set forth their views on the legal and policy questions presented."[14]

Nor will it suffice to imply, as the conclusion of the Commission's petition in this cause does, that the issue is so nearly similar in this case to the issue in No. 60 that the question of public importance may be decided in No. 60 without examination of the context of our litigation. On that subject this Court has written:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or mangerial."[15]

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[13]Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 American Bar Association Journal 801 (1951).

[14]Memorandum for the Federal Power Commission, *Amicus Curiae*, filed in the United States Court of Appeals for the Fifth Circuit, No. 22272, *J. M. Huber Corporation v. William Harvey Denman* (January 1966), p. 7.

[15]*S.S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

Because the decisions of the Court of Appeals for the Tenth Circuit are correct, we believe that the petitions for certiorari in both this case and No. 60 should be denied. If however the Court determines to grant the petition in either case, then it should be granted in both. In that event counsel for Respondents in both cases will be permitted to make a maximum contribution to the Court's deliberations by scheduling hearings in the two actions consecutively.

Respectfully submitted,

Of Counsel:
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002

CECIL N. COOK
NEAL POWERS, JR.
1100 Esperson Building
Houston, Texas 77002
Attorneys for
E. Cockrell, Jr., Freeport
Sulphur Company, and
U. S. Oil of Louisiana Inc.

BRUCE R. MERRILL
JOSEPH C. JOHNSON
THOMAS H. BURTON
P. O. Box 2197
Houston, Texas 77001
Attorneys for
Continental Oil Company

W. P. BARNES
JERE G. HAYES
Meadows Building
Dallas, Texas 75206

Of Counsel:
CANTEY, HANGER,
GOOCH, CRAVENS
& SCARBOROUGH
1800 First National Bldg.
Fort Worth, Texas 76102

CECIL E. MUNN
H. CARTER BURDETTE
1800 First National Building
Fort Worth, Texas 76102
Attorneys for General American Oil Company of Texas

Of Counsel:
MILLING, SAAL,
SAUNDERS, BENSON
& WOODWARD
1122 Whitney Building
New Orleans, La. 70130

H. H. HILLYER, JR.
H. H. HILLYER III
1122 Whitney Building
New Orleans, La. 70130
Attorneys for J. Ray McDermott & Co., Inc.

OLIVER L. STONE
THOMAS G. JOHNSON
3969 R. C. A. Building
50 West 50th Street
New York, New York 10020
Attorneys for Shell Oil Company

MURRAY CHRISTIAN
H. W. VARNER
P. O. Box 1521
Houston, Texas 77001
Attorneys for The Superior Oil Company